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## Combating Class Settlement Objectors: New Rule 23 Amendments, Key Preventive Measures and Tactics

Minimizing and Defending Against Challenges by Professional Objectors, Government Officials, and Public Interest Groups

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WEDNESDAY, JUNE 19, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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**Robinson+Cole**

# Combating Class Settlement Objectors: New Rule 23 Amendments

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# New Rule 23 Amendments

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- Notice to Class Members
- Preliminary Approval Requirements
- Objections
- Payments in Connection with an Objection
- No Appeal from Preliminary Approval Under Rule 23(f)

# Notice

## **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses \* \* \* \* \***

### **(2) Notice. \* \* \* \* \***

**(B) For (b)(3) Classes.** For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:...

# Notice – Advisory Committee Note

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- First-class mail still may be primary method.
- New technology may make notice more effective.
- Courts should “consider the capacity and limits of current technology, including class members’ likely access to such technology.”
- “[I]t is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.”

# Settlements – Rule 23(e)

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**(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

# Settlements – Rule 23(e)

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## (1) Notice to the Class

**(A) Information That Parties Must Provide to the Court.** The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

**(B) Grounds for a Decision to Give Notice.** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

# Settlements – Rule 23(e)

**(2) Approval of the Proposal.** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:-

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
  - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members are treated equitably relative to each other.

## Settlements – Rule 23(e)

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**(3) Identifying Agreements.** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

**(4) New Opportunity to Be Excluded.** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

# Settlements – Rule 23(e)

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## **Advisory Committee Note:**

“The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object.”

# Objectors – Rule 23(e)(5)

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## **(5) Class-Member Objections.**

**(A) In General.** Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

## Objectors – Rule 23(e)(5)

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**(B) Court Approval Required for Payment In Connection With an Objection.** Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

# Rule 23(f) Amendment

**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

# N.D. Cal. Procedural Guidance

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- Motion for preliminary approval
  - Differences between litigation class and settlement class
  - Differences between claims to be released and claims in operative complaint
  - Anticipated class recovery, potential maximum recovery
  - Estimated take rate based on recent settlements of similar cases, with details
  - Potential amount of any reversion, why appropriate
  - Details re: settlement administrator selection, anticipated administration costs
  - Various specific suggestions for notice

# N.D. Cal. Procedural Guidance

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- Suggested language for class notice re: objections
- Lodestar calculation and costs should be in preliminary approval motion
- Incentive awards – consult judge’s decisions
- Cy pres – identify how recipients related to subject matter of lawsuit and class members; identify any relationship with parties / counsel
- Lead class counsel should provide details re distributions of their prior settlements

# N.D. Cal. Procedural Guidance

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- Motion for final approval
  - Number of valid claims submitted
  - Attorney's fees – detailed lodestar submissions
  - Incentive awards – evidence of class representatives' involvement in the case
- Post-distribution accounting

# Combating Class Action Settlement Objectors: The Usual Suspects

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Drinker Biddle

# The Usual Suspects:

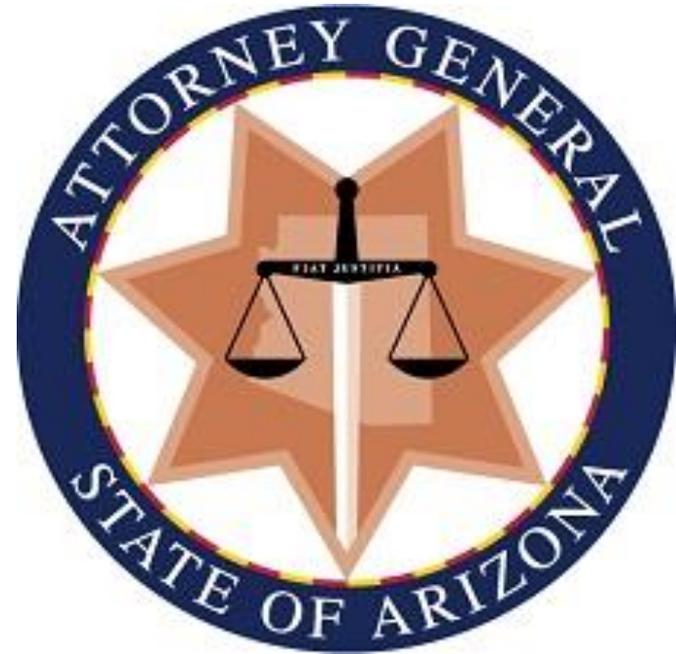
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- Governmental Objectors
- Traditional Objectors
- Vengeful Objectors
- Professional Objectors
- Ideological Objectors

# Governmental Objectors

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- The US AG
- Several State AGs



# Can They “Object” In The First Place?

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“Any **class member** may object to the proposal if it requires court approval under this subdivision (e).”

Fed. R. Civ. P. 23(e)(5)(A)

“[A]ny officer of the Department of Justice ... may be sent ... to any State or district in the United States **to attend to the interests of the United States** in a suit pending in a court of the United States....”

28 U.S.C. § 517.

# What Does CAFA Say?

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“[T]he bill of rights provides an additional mechanism to safeguard plaintiff class members’ rights by requiring that notice of class action settlements be sent to appropriate state and federal officials, so that they may voice their concerns if they believe that the class action settlement is not in the best interest of their citizens.”

CAFA Senate Report at 5.

“Nothing in this section shall be construed to expand the authority of . . . Federal or State officials.”

28 U.S.C. § 1715(f)

# Who Should Receive Notice?

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- (1) **APPROPRIATE FEDERAL OFFICIAL.** In this section, the term “appropriate Federal official” means—
- (A) the Attorney General of the United States; or
  - (B) in any case in which the defendant is a Federal depository institution..., the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

# Who Should Receive Notice? (cont.)

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- (2) **APPROPRIATE OFFICIAL.** In this section, the term “appropriate State official” means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

# Can I Ignore This Requirement?

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(b) **In General.** Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement **shall serve** upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of. . . .

. . .

(d) **FINAL APPROVAL.** **An order giving final approval of a proposed settlement may not be issued** earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

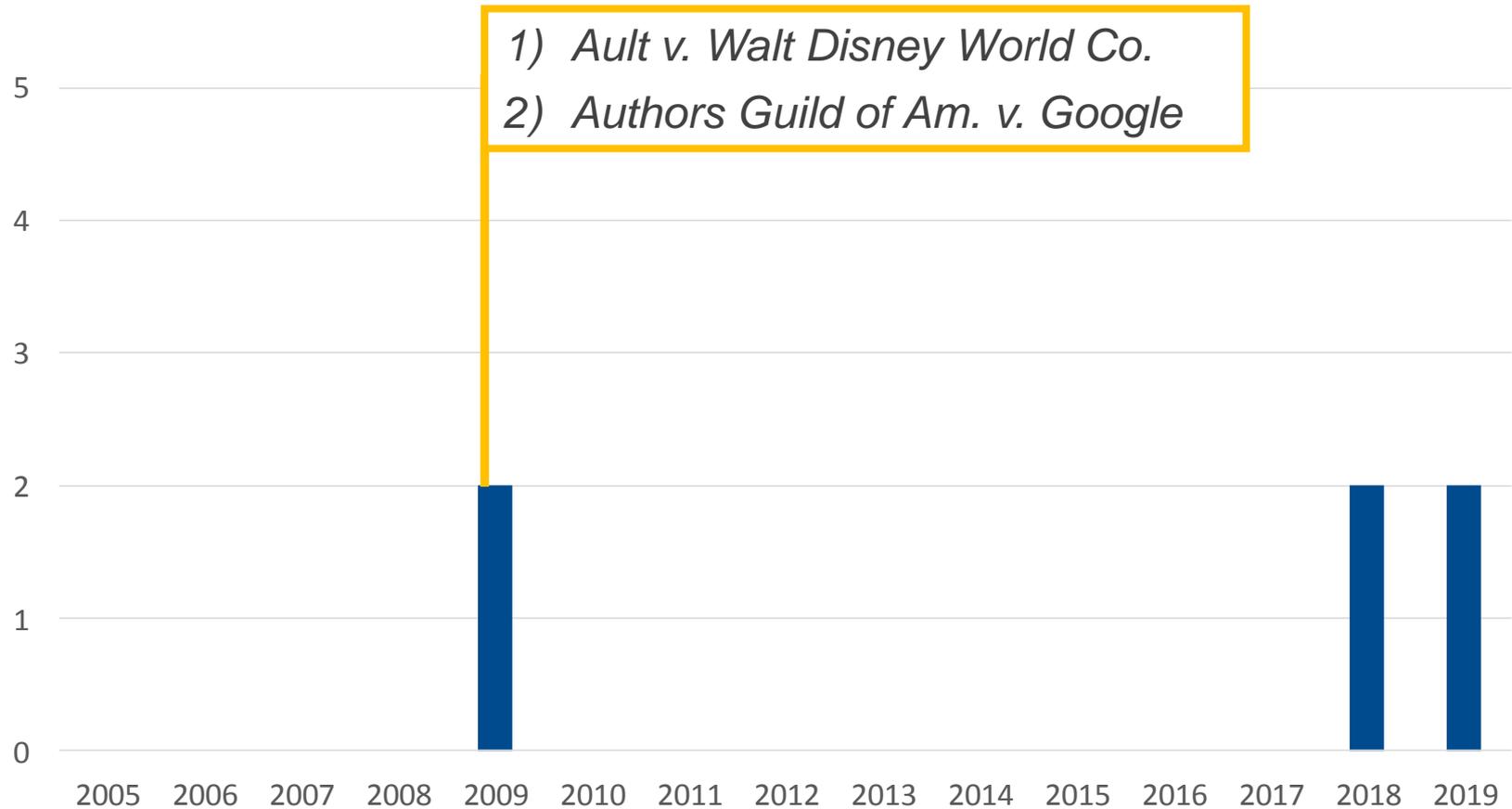
# Can I Ignore This Requirement? (cont.)

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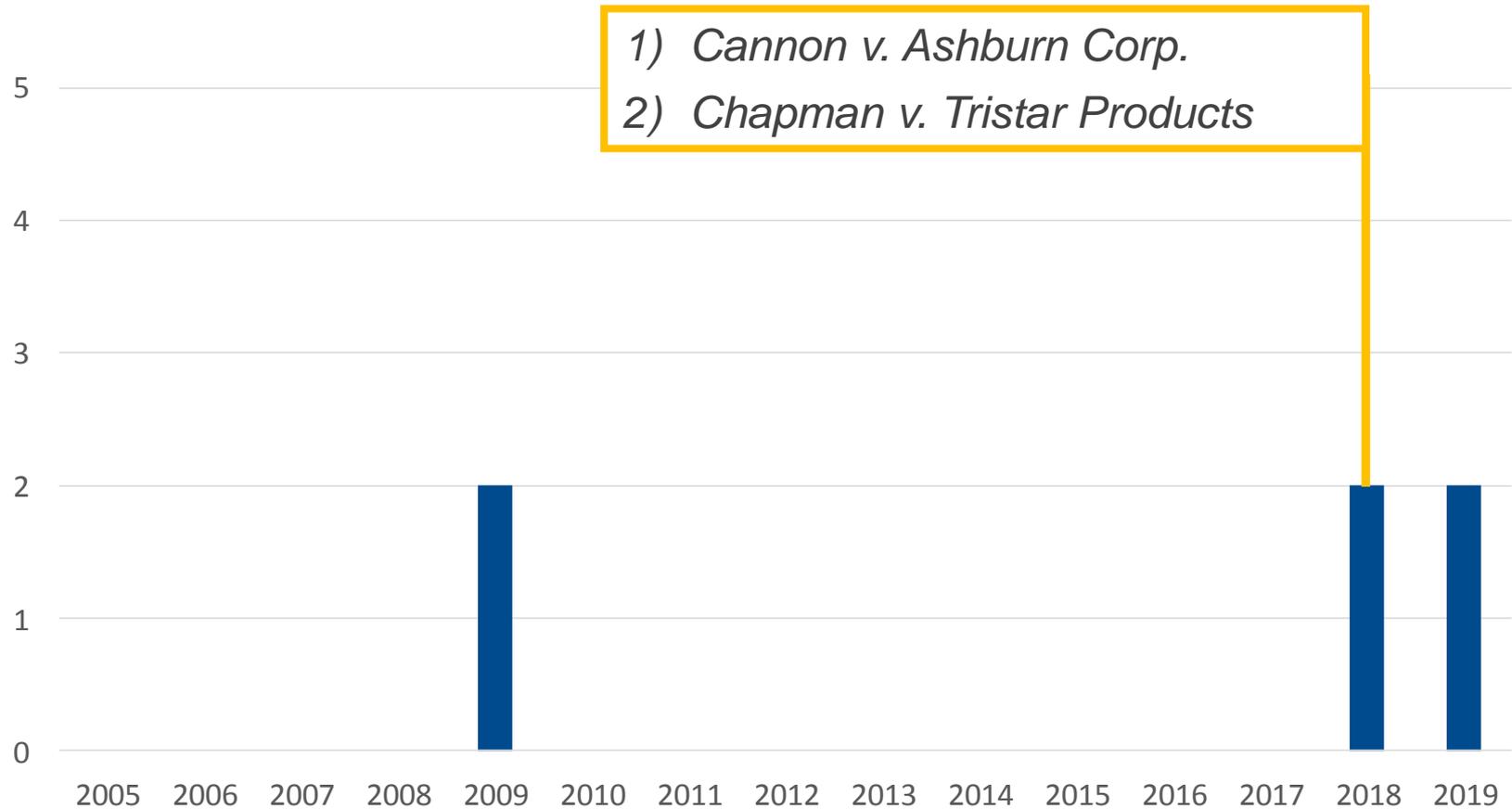
## (e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.

- (1) **In general.** A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.
- (2) **Limitation.** A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

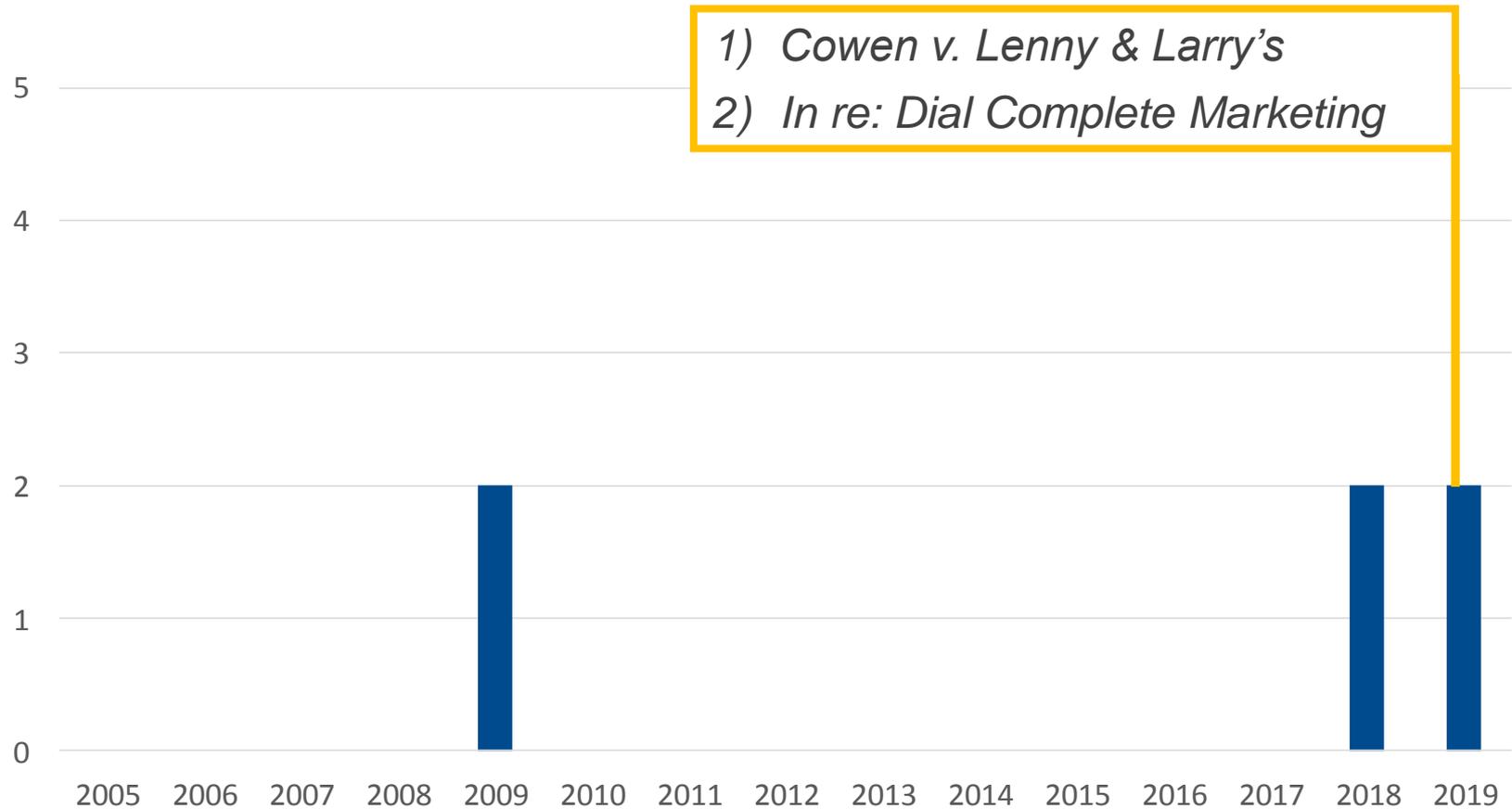
# DOJ Objections By Year



# DOJ Objections By Year



# DOJ Objections By Year



# DOJ Objections

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“It turns out that DOJ receives over 700 CAFA notices every year, but has only participated in two cases, and those were more than a decade ago. Why? It wasn’t for a lack of worthy cases. **It was an almost comical story of government bureaucracy.** Mail to the AG undergoes what the mailroom calls “strict scrutiny.” This means a CAFA notice goes through multiple mail rooms, each in a different government building and each requiring weeks of processing and sorting. They’re scanned by X-ray machines, which makes any CDs in the package unreadable. And that’s just the mailroom process. **On average, it would take 70 days from receipt until a lawyer reviewed the notice. . . .** We’ve begun to fix that process, and are already in a better position to review settlements. . . .”

Rachel Brand, Then-Associate Attorney General (Feb. 2018)

# DOJ Objections

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- DOJ has filed at least four "Statements of Interest":
  - *Cannon v. Ashburn Corp.*, No. 16-1452 (D.N.J.): “Rebate codes” for up to \$2-per-bottle credits on wine purchases.
  - *Chapman v. Tristar Products, Inc.*, No. 16-1114 (N.D. Ohio): Disproportionately large incentive award and fee award.
  - *Cowen v. Lenny & Larry’s, Inc.*, 17-1530 (N.D. Ill.): Fees based on value of free cookies to nonclass members.
  - *In re: Dial Complete Marketing & Sales Practices Litig.*, No. 11-2263 (D.N.H.): Fees based on value of enjoining practice that the defendant had already abandoned.

# AG Objections

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- Earliest notable example: *Figueroa v. Sharper Image*.
- Many recent ones have been filed by Mark Brnovich, the (Republican) Attorney General of Arizona.
- “If people are going to use the judicial system to make sure people are held accountable, the victims should be the ones getting the restitution and the benefits.” – Mark Brnovich.
- “When I see people I think are working the system, enriching themselves at the expense of others, that offends me.” – Mark Brnovich.

# Traditional Objectors

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- "Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h)." Advisory Committee Notes – 2018 Amendment.

# Vengeful Objectors

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- Can occur when there are overlapping class actions and the defendant settles one but not the other.
- The spurned plaintiff can move to intervene under Rule 24 or simply object under Rule 23, and then argue that a "reverse auction" occurred.
- *Technology Training Assocs., Inc. v. Cin-Q Autos.* (11th Cir. 2017)
  - The settling plaintiff's "desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class" constituted a violation of counsel's "ethical duty to the class."

# Professional Objectors

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- “[P]erhaps the least popular parties in the history of civil procedure.” Professor Edward Brunet (2003).
- “In a nutshell, professional objectors profit by extorting payments from class counsel.” Prof. John Lopatka and the Hon. D. Brooks Smith (2011).
- “The remoras are loose again.” *In re UnitedHealth Group PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108 (D. Minn. 2009) (Rosenbaum, J.)

# The Most Active Objectors

Objector	Objections
Christopher Bandas	76
Joseph Palmer	61
Patrick Sweeney	46
Ted Frank	40
Steve Miller	36
John Pentz	31
Jonathan Fortman	30
John Kress	28
Albert Bacharach, Jr.	20
Timothy Hanigan	16

# Rule 23(e)(5) – New and Improved!

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## (5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

# Rule 23(e)(5) – Advisory Committee

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“But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.”

# Rule 23(e)(5) – Advisory Committee

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- “Because the concern only applies when consideration is given in connection with withdrawal of an objection, ... the amendment requires approval . . . only when consideration is involved.”
- “Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment ... is instead to another recipient.”
- “The term ‘consideration’ should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel.”
- “Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context.”

# Case Study: *Edelson v. Bandas*

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**VS.**



# Case Study: *Edelson v. Bandas* (cont.)

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- Case filed in the Northern District of Illinois in 2018.
- Filed by one Plaintiffs' firm (Edelson) against another (Bandas).
- Asserted RICO and state-law claims.
- In 2018, the court rejected the RICO claim but allowed state-law claims to proceed.
- The court was not pleased: "The alleged conduct appears to be in bad faith, to have no genuine social value, and to be inconsistent with the ethical standards of the legal profession.... Gaming the rules of the legal system solely for personal self-enrichment wastes the time and money of courts and attorneys, wrests funds away from deserving litigants, and tarnishes the public's view of the legal process. . . ."

# Case Study: *Edelson v. Bandas* (cont.)

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- The parties engaged in extensive, contentious discovery regarding the remaining state-law claims.
- In January 2019, Bandas “unconditionally surrendered” rather than produce various documents.
- The court then:
  - permanently enjoined Bandas from practicing in Illinois
  - Required Bandas to attach a copy of the order to any application to appear in other courts across the county.
  - Pay Edelson \$5,447 in costs.

# Ideological Objectors

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- As the name suggests, they are motivated by a desire to change the law, not make money.
- Generally filed by public interest organizations.
- Most notable example: Ted Frank.

# Case Study: Ted Frank

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## Case Study: Ted Frank (cont.)

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- Founded the Center for Class Action Fairness, which is now part of the Competitive Enterprise Institute.
- His group is privately funded by undisclosed donors.
- He has appeared as an objector in >40 cases.
- He requires clients to agree in retainer agreements that they are not looking for financial payoffs.
- “The leading critic of abusive class action settlements” – The New York Times.
- “Among class action lawyers’ most feared objectors” – Reuters.

# Case Study: Ted Frank (cont.)

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- But he has also worked behind the scenes as a consultant (for Bandas) and writer and oral advocate (for Palmer) in a number of others cases.
- Filings in the Seventh Circuit revealed that Frank had earned >\$250K from this side business.
- Frank subsequently had a very public falling out with the professional objectors, describing the dispute as “lurid, complex and Grisham-esque.”



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## Basic strategies

- Prevention
- Negotiation
- Litigation
- Coercion

NOTE – Each of following strategies discussed has actually been employed in cases.

## Prevention

- Objector-proof the settlement
- Show that settlement is good idea
  
- Works best with
  - Competitors
  - Public Interest
  
- Can also mitigate professionals

## Prevention – Settlement Structure

- Structure settlement to frustrate litigation over fairness
- Quick-pay provisions
  - pay plaintiffs' counsel immediately, class after approval
- Brief objection periods
- Injunctive rather than monetary relief

# Prevention - Competitors

- Play fair with other counsel
  - Be transparent about auctions
  - Be “fair” in settlement allocations
  - Don’t use bar provisions that will alienate co-defendants

- **Drawbacks**

- Can lose advantage in competitive settings
- Can annoy corporate clients

# Prevention – Ideologues (ND Cal Guidelines)

- Due diligence
- Cost-benefit for absent class members
- Scope of the release (larger than complaint).
- Expansion of class (started out small, got big in settlement)
- Reversions (favor defendants)
- Claim procedure (if it discourages claims)
- Incentive payments (why does the named plaintiff need more than the class member?)

## Prevention – Other red flags

- Coupons
  - *Feder v. Frank*
- Excessive cy pres relief
  - *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).
- Subclasses with competing interests
  - *Dewey v. Volkswagen Aktiengesellschaft*, 681 F. 3d 170 (3d Cir. 2012).

# Negotiation

- Not all objectors are the enemy:
  - They are constituents of the settlement, even if not the majority.
  - They can help drive down fees in settlement negotiations.
  - May help strengthen settlement.

## Drawbacks

- Annoys plaintiffs

## Negotiation

- Genuine compromise
  - Remove offending provisions
  - Add value for class members
  - Reduce fees

# Negotiation - Buyoff

- Pay the objector to go away
  - Competitors – may require fees
  - Professionals – will require fees
  - Public Interest– client can sometimes be induced to fold

- **Drawbacks**

- Looks like collusion
- Side agreements & payoffs must be disclosed to court

## Litigation

- Discovery
- Sanctions
- Separate lawsuits
- Fight fees
- Appeals bonds

# Litigation - Discovery

- Require objectors to list other objections
  - Depositions into adequacy
  - Explore relationships with objector counsel
  - Information of objection history.
    - *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 316 (W.D. Tex. 2007) (disclosure of attorneys' objection history would not chill objections).
- **Drawbacks**
    - Tensions with usual plaintiff procedures.
    - Some judges don't care about objectors' history

# Litigation - Sanctions

- Works when objection frivolous
  - *In re Petrobras Secs. Litig.*, 2018 WL 4521211 (S.D.N.Y. Sep. 21, 2018) (sanctioning objectors for boilerplate objections not based in fact).
- Can deter some objectors
  - *Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797, 806 n.32 (E.D. La. 2008) (objector withdrew motion after sanction motions filed).

## Drawbacks

- Courts may be reluctant to grant
- Will make subsequent negotiations more difficult

# Litigation – Separate Lawsuit

- Bruce Greenberg recommends
- If evidence allows:
  - RICO claim
  - *See Edelson PC v. Bandas Law Firm PC*, 2018 WL 6588436 (N.D. Ill. Dec. 14, 2018) – (Bandas offered judgment admitting unauthorized practice of law).
- *But see – Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).
  - Plaintiff's firm filed lawsuit against defendant expert
  - Wound up losing huge amount of money

# Litigation - Opposition to fees

- Oppose fees entirely
- Require submission of timesheets & expenses
- Require lodestar
- **Drawbacks**
  - Tension when plaintiffs' counsel requests fees
  - Not as effective against public interest

## Litigation – Appeals bonds

- FRAP 7 – “In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.”
- Language is permissive
- Means there may be inquiry into equities of situation
- Courts generally reluctant

## Coercion

- Embarrassment
- Threats
- Payback

# Coercion - Embarrassment

- Public embarrassment related to settlement
  - Characterize as holdouts, greedy, etc.
- **Example:** Letter to class members by plaintiffs in *Cobell v. Salazar*.
- Unlikely to work with public interest
  - May dig in
- Requires “clean hands”
- May violate ethical rules

# Coercion – Threats

- Public embarrassment unrelated to settlement
  - Personal peccadilloes
- Litigation
- Any other leverage one may hold

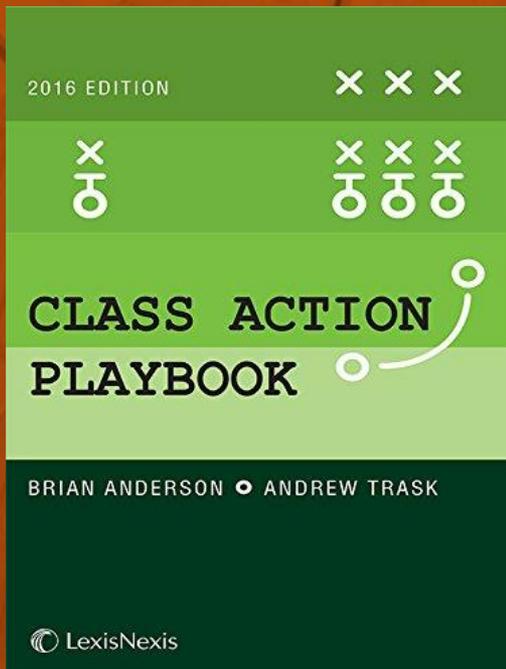
- **Drawbacks**

- Likely unethical
  - Model Rule 3.4(e)
  - Model Rule 3.6
- May backfire if used (cf. Lerach-Fischel feud)

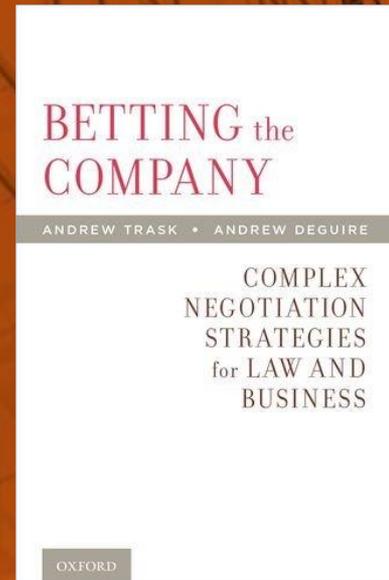
# Coercion – Payback

- Objectors may be repeat players
- Implicit threat of non-cooperation in subsequent cases
- Most effective against
  - Competitors
  - Professionals

For more, see



Chapter 8 – Settlement tactics



Chapter 3 – Multiple Parties